

PACK SQUARE AGREEMENT

THIS PACK SQUARE AGREEMENT (this "Agreement") is made, entered into and effective as of the 14 day of August, 2001, by and between the CITY OF ASHEVILLE, a North Carolina Municipal Corporation (herein "City"), the COUNTY OF BUNCOMBE, a North Carolina County (herein "County"), and the PACK SQUARE CONSERVANCY, INC., a North Carolina nonprofit corporation exempt from federal income tax under Section 501(a) of the Internal Revenue Code, as amended (the "Code"), as an organization described in Section 501(c)(3) of the Code (herein "PSC").

WITNESSETH:

WHEREAS, the City has the authority pursuant to G.S. 160A-353 to set aside lands and buildings for parks, and to provide, construct, equip, operate and maintain parks and associated facilities; and has the authority pursuant to G.S. 160A-20.1 to contract with any private entity to carry out any public purpose that the City is authorized by law to engage in; and

WHEREAS, the County has the authority pursuant to G.S. 153A-444 to set aside lands and buildings for parks, and to provide, construct, equip, operate and maintain parks and associated facilities; and has the authority pursuant to 153A-13 to contract with any private entity to carry out any public purpose that the County is authorized by law to engage in; and

WHEREAS, Pack Square and City-County Plaza are defined in Exhibit A attached hereto and made a part hereof (hereinafter Pack Square and City-County Plaza as defined in Exhibit A are collectively referred to as the "Pack Square Renaissance Area");

WHEREAS, the Pack Square Renaissance Area constitutes the centerpiece of the Asheville and County parks system and downtown Asheville, which is the largest city in the County; and

WHEREAS, the Pack Square Renaissance Area is the most important public space in the City and County and has been a gathering place for the citizens of the City and County; and

WHEREAS, PSC was formed for the purpose of promoting and facilitating the redevelopment and sustained maintenance of the public areas of the Pack Square Renaissance Area through plan development and preparation, fund raising, and the construction and financing of improvements;

NOW, THEREFORE, in consideration of the foregoing and the mutual agreements and covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

ARTICLE I GENERAL PURPOSE

- 1.1. **General.** The purpose of this Agreement is to provide for the redevelopment of the Pack Square Renaissance Area (the "Project") in accordance with the terms and conditions contained herein.
- 1.2. **Coordination of Redevelopment.** PSC shall coordinate the redevelopment of the Pack Square Renaissance Area, as defined herein, through involvement of the private sector, including financing, plan preparation and development, and construction and implementation.
- 1.3. **Grant of Authority.** Subject to the terms of this Agreement, the City and County hereby grant PSC the authority to conduct the activities contained herein with respect to the Pack Square Renaissance Area generally and with respect to any of their lands, interests or rights contained therein. Notwithstanding the foregoing [and except for the rights contained herein,], PSC shall not have any ownership interest in the Pack Square Renaissance Area and shall not be deeded any property in the Pack Square Renaissance Area. Please also see Article 10 of this Agreement relating to continued ownership by the City and County of their present respective interests in the Pack Square Renaissance Area.

ARTICLE II PROJECT AREA

- 2.1. **General.** This Agreement shall relate to the Pack Square Renaissance Area, a legal description of which is attached hereto and incorporated herein on Exhibit A.

ARTICLE III DESIGN AND CONSTRUCTION

- 3.1. **General.** PSC shall provide overall management of the Project consisting of the overall design and construction of the Project.
- 3.2. **Design.** Subsequent to obtaining input from the residents of City and County, PSC shall provide a design for the Project, subject to approval by the City and County, which approval shall not be unreasonably withheld or delayed.

3.3. Capital Funding & Budget.

- (a) General. PSC shall coordinate capital funding for the Project and submit a budget for the Project to the City and County for approval, which approval shall not be unreasonably withheld or delayed.
- (b) Solicitation. PSC shall obtain and apply revenues to fund the Project. PSC shall solicit funds from private and governmental donors and shall expend those funds, including any City or County funds it receives, for the Project and for the purpose of designing, constructing, preserving, restoring, maintaining, developing, and improving the Pack Square Renaissance Area, and educational activities related thereto. It shall inform the City and County on a regular basis of its planned and actual expenditures and disbursements.
- (c) PSC Funds. With regard to the Project and any phase or portion thereof, and other programs that are applicable to the Project and the Pack Square Renaissance Area, PSC shall have final authority over the actual disbursement of its own funds; however, such authority does not supercede the various City and County rights of approval contained herein.

3.4. Construction. Upon approval of the Project design as set forth in Section 3.2 of this Agreement and upon approval of the Project budget as set forth in Section 3.3 (a) of this Agreement, PSC shall, with respect to the construction of the Project:

- (a) Selection of Contractor and Subcontractors: PSC shall have the sole authority to enter into contracts and subcontracts with respect to construction of the Project, so long as any such work contracted for complies with the design approved under Section 3.2 of this Agreement, and is within the budget established under Section 3.3 (a) of this Agreement. In the event PSC desires to enter into a contract or subcontract which includes deviation from either the approved design or budget, PSC must first obtain the approval of such deviation, in accordance with the process established in Section 3.2 and/or Section 3.3 (a) herein, as applicable. The processes for bidding and awarding said contracts and subcontracts shall be consistent with the local government bidding requirements contained in the N.C. General Statutes, where required by law.
- (b) Management: PSC shall have the sole authority to manage any construction of the Project, so long as all management conducted complies with the design approved under Section 3.2 of this Agreement, and is within the budget established under Section 3.3 (a) of this Agreement. In the event PSC desires to enter into a contract or subcontract which includes deviation from either the approved design or budget, PSC must first obtain the approval of such deviation, in accordance with the process established in Section 3.2 and/or Section 3.3

(a) herein, as applicable.

- (c) Coordination of effort by City: The City agrees to take such steps as are necessary and appropriate to redefine, redirect and reroute rights of way (including, but not limited to, public roads and streets) and easements, consistent with the Project design approved under Section 3.2 of this Agreement.
- (d) Obligation to Contract and Proceed with Construction: PSC reserves the right, in its sole discretion, to delay the entering into construction contracts for the Project or to proceed with construction of the Project for any reason, including without limitation, in the event that funding of the Project is not sufficient to justify proceeding. However, in no case shall the completion of Project construction be delayed beyond December 31, 2006 without the consent of the City and County.
- (e) Reports: PSC agrees to provide status reports to City and County on Project design and construction at not less than quarterly intervals until Project completion consistent with the approved design.

3.5. Construction by City and County. Nothing herein may be construed to prevent the City or County from proceeding with construction of any element of the approved design with respect to which no contract for construction has been awarded by PSC. In such event, the City or the County shall provide notice to PSC in a timely manner.

ARTICLE IV MAINTENANCE

- 4.1. Endowment**. PSC shall create an endowment fund to assist in the long-term developmental maintenance of the Pack Square Renaissance Area, and all capital improvements and betterments made thereto pursuant to the Project.
- 4.2. Maintenance**. The City and County shall perform the on-going maintenance of the Pack Square Renaissance Area and the improvements made thereto, including without limitation, trash clean-up, landscape maintenance, mowing, pruning of trees, removal of weeds or unsightly growths, abatement of unsightly or unsafe nuisances (not related to any improvement or betterment), sidewalk and road maintenance, and street cleaning, in accordance with usual public parks and facilities maintenance practices and schedules. Any maintenance plan developed with respect to the Pack Square Renaissance Area and the improvements made thereto shall be agreed to by the City, County and PSC.
- 4.3. Repairs**. The City or County shall perform repairs to the Pack Square Renaissance Area and the improvements made thereto, in conformity with the design as constructed, using like materials and construction techniques; provided, that nothing herein shall require the City or County to undertake any

repairs.

ARTICLE V DESIGN REVIEW

- 5.1. **Design Guidelines.** PSC shall develop design guidelines with respect to projects within the Pack Square Renaissance Area and the improvements made thereto, which guidelines must be approved by PSC, the City and the County (the "Design Guidelines"). As more specifically set forth in the Design Guidelines, projects within the Pack Square Renaissance Area and improvements thereto shall be made in conformity with the Design Guidelines. The Design Guidelines shall contain a procedure for review and approval of all Permanent Improvements prior to construction of the same.
- 5.2. **Design Review.** PSC shall conduct design review of projects within the Pack Square Renaissance Area and the improvements made thereto in accordance with the Design Guidelines developed and approved pursuant to Section 5.1 of this Agreement. All Permanent Improvements within the Pack Square Renaissance Area will be subject to mandatory design review and mandatory compliance (as further defined in the Design Guidelines) before being permitted or approved by the City and/or County.
- 5.3. **Permanent Improvements.** "Permanent Improvements" shall be those permanent improvements defined and described within the Design Guidelines.

ARTICLE VI CITY SERVICES

- 6.1. **Services.** The City will render the following services and assistance relating to the Pack Square Renaissance Area and the Project, subject to availability of funds and budgetary and other approvals, where required.
- (a) **Technical Assistance.** City shall provide technical assistance in design and construction and in compliance with legal requirements.
 - (b) **Processing of Approvals.** City shall promptly process requests for approval of projects or applicable portions, phases or parts.
 - (c) **Access.** City shall provide reasonable access to City properties for purposes of preparing and implementing Project plans.
 - (d) **Real Property.** City shall acquire real property that the City deems necessary for the Project.
 - (e) **Traffic and Streets.** City shall cooperate with street closure and traffic planning.

- (f) Permits. City shall facilitate building and construction permit approvals relating to the Project.
- (g) Events. City shall retain its authority and responsibility with respect to all public or private events held in the Pack Square Renaissance Area.
- (h) Certain Design and Improvements. City shall be responsible for design and improvements of off-site infrastructure changes necessary to facilitate the Project construction, as designed and as approved by City, including, without limitation, changes needed to rights of way (including, but not limited to, public roads and streets) and easements.
- (i) Compliance with Law. City shall provide its services hereunder in conformity with all applicable laws, rules and regulations.
- (j) Events Excusing Performance. City shall not be liable to County or PSC for failure to perform any of the services required herein in the event of strikes, lock-outs, calamities, acts of God, unavailability of supplies or other events or conditions over which City has no control for so long as such events continue, and for a reasonable period of time thereafter. City agrees to use reasonable business efforts to avoid the events set forth above and to minimize the impact of such events.

6.2. **Payment of Fees**. PSC is expected to pay all fees applicable to the services described in 6.1, above. Nothing herein shall be construed as a waiver of any such fee by the City.

6.3. **Independent Contractor**. In the performance of the work duties and obligations evolving upon City under this Agreement, it is mutually understood and agreed that City is at all times, acting and performing as an independent contractor. No provision of this Agreement is intended to create or shall be deemed or construed to create any relationship between City and PSC or City and County other than that of independent entities contracting with each other solely for the purpose of effecting provisions of this Agreement. Neither City and PSC nor City and County is or shall be considered an employer, employee, partner or joint venturer of the other.

ARTICLE VII COUNTY SERVICES

7.1. **Services**. The County will render the following services and assistance relating to the Pack Square Renaissance Area and the Project:

- (a) Technical Assistance. County shall provide technical assistance in design and construction and in compliance with legal requirements.

- (b) Processing of Approvals. County shall promptly process requests for approval of projects or applicable portions, phases or parts.
- (c) Access. County shall provide reasonable access to County properties for purposes of preparing and implementing Project plans.
- (d) Real Property. County shall acquire real property that the County deems is necessary for the Project.
- (e) Compliance with Law. County shall provide its services hereunder in conformity with all applicable laws, rules and regulations.
- (f) Events Excusing Performance. County shall not be liable to City or PSC for failure to perform any of the services required herein in the event of strikes, lock-outs, calamities, acts of God, unavailability of supplies or other events or conditions over which County has no control for so long as such events continue, and for a reasonable period of time thereafter. County agrees to use reasonable business efforts to avoid the events set forth above and to minimize the impact of such events.

7.2. Independent Contractor. In the performance of the work duties and obligations evolving upon County under this Agreement, it is mutually understood and agreed that County is at all times, acting and performing as an independent contractor. No provision of this Agreement is intended to create or shall be deemed or construed to create any relationship between County and PSC or County and City other than that of independent entities contracting with each other solely for the purpose of effecting provisions of this Agreement. Neither County and PSC nor County and City is or shall be considered an employer, employee, partner or joint venturer of the other.

ARTICLE VIII PSC SERVICES

8.1. Services. PSC shall render all of the services and assistance relating to the Pack Square Renaissance Area and the Project as defined throughout this Agreement:

- (a) Compliance with Law. PSC shall provide its services hereunder in conformity with all applicable laws, rules and regulations.
- (b) Events Excusing Performance. PSC shall not be liable to City or County for failure to perform any of the services required herein in the event of strikes, lock-outs, calamities, acts of God, unavailability of supplies or other events or conditions over which PSC has no control for so long as such events continue, and for a reasonable period of time thereafter. PSC agrees to use reasonable business efforts to avoid the events set forth above and to minimize the impact of such events.

- 8.2. **Independent Contractor.** In the performance of the work duties and obligations evolving upon PSC under this Agreement, it is mutually understood and agreed that PSC is at all times, acting and performing as an independent contractor. No provision of this Agreement is intended to create or shall be deemed or construed to create any relationship between PSC and City or PSC and County other than that of independent entities contracting with each other solely for the purpose of effecting provisions of this Agreement. Neither PSC and City nor PSC and County is or shall be considered an employer, employee, partner or joint venturer of the other.

ARTICLE IX TAX PARTNERSHIP

City, County and PSC affirmatively state that they do not have the intention to form a joint venture or partnership nor have they done so.

ARTICLE X OWNERSHIP

- 10.1. **Ownership by City.** Any improvements to City property undertaken by PSC pursuant to this Agreement, including, but not limited to, construction, landscaping, plantings and installations, shall become the property of City upon completion. Nothing contained in this Agreement shall have the effect of relinquishing to PSC the ultimate control and authority of City over the respective property it owns in the Pack Square Renaissance Area nor shall this Agreement have the effect of transferring to PSC any right, title or interest of City in and to the respective property it owns in the Pack Square Renaissance Area.
- 10.2. **Ownership by County.** Any improvements to County property undertaken by PSC pursuant to this Agreement, including, but not limited to, construction, landscaping, plantings and installations, shall become the property of County upon completion. Nothing contained in this Agreement shall have the effect of the relinquishing to PSC the ultimate control and authority of County over the respective property it owns in the Pack Square Renaissance Area nor shall this Agreement have the effect of transferring to PSC any right, title or interest of County in and to the respective property it owns in the Pack Square Renaissance Area.

ARTICLE XI INDEMNIFICATION

- 11.1. **Indemnification by City.** City shall indemnify and hold harmless County and PSC, and each of their respective members, directors, partners, officers, agents, affiliates and employees from and against any and all claims, demands, liabilities,

losses, damages, costs and expenses (including reasonable attorney's fees), resulting in any manner, directly or indirectly from the acts or omissions of City, its employees, independent contractors, partners, members, shareholders, officers, directors, affiliates and agents.

11.2. Indemnification by County. County shall indemnify and hold harmless City and PSC, and each of their respective members, directors, partners, officers, agents, affiliates and employees from and against any and all claims, demands, liabilities, losses, damages, costs and expenses (including reasonable attorney's fees), resulting in any manner, directly or indirectly from the acts or omissions of County, its employees, independent contractors, partners, members, shareholders, officers, directors, affiliates and agents.

11.3. Indemnification by PSC. PSC shall indemnify and hold harmless City and County, and each of their respective members, directors, partners, officers, agents, affiliates and employees from and against any and all claims, demands, liabilities, losses, damages, costs and expenses (including reasonable attorney's fees), resulting in any manner, directly or indirectly from the acts or omissions of PSC, its employees, independent contractors, partners, members, shareholders, officers, directors, affiliates and agents.

ARTICLE XII GENERAL PROVISIONS

12.1. Assignment. This Agreement shall not be assigned without the prior written consent of the other parties, which consent shall not be unreasonably withheld or delayed.

12.2. Term. This Agreement shall continue in full force and effect for five (5) years after the date of this Agreement and unless otherwise terminated as provided hereunder, shall automatically renew perpetually for successive five (5) year terms. The term of this Agreement may be extended by the mutual Agreement of the parties to this Agreement prior to the termination of the original, and any extended term hereunder.

12.3. Termination. Notwithstanding the provisions of the foregoing Section 12.2, this Agreement may be terminated for any reason, without cause, by any party upon the giving of one (1) year written notice to the other parties delivered in person or by first class, registered or certified mail or by overnight carrier. In addition, any party shall have the right to terminate this Agreement, but only for cause, at any time upon ninety (90) days' prior written notice to the other parties. Such notice shall describe in detail the basis upon which such termination is justified. Upon receipt of such notice, the breaching party shall have ninety (90) days during which to attempt to cure any alleged default under this Agreement, and upon such cure being effected, the right to terminate shall cease and this Agreement will continue in full force and effect. Furthermore, if the breaching party has diligently attempted to effect such a cure within such ninety day period but cannot

complete such cure because of the failure of a third party (such as, but not limited to, a non-party governmental agency) to act within such period, then they shall have a reasonable time beyond such ninety day period to complete its cure of the alleged basis for the election to terminate.

- 12.4. **Binding.** This Agreement shall be binding upon the parties hereto and their respective heirs, representatives, successors and assigns.
- 12.5. **Governing Law.** This Agreement shall be governed according to the laws of the State of North Carolina and the site of any litigation concerning this Agreement shall be a court of competent jurisdiction located in Buncombe County, North Carolina.
- 12.6. **Headings.** The headings of this Agreement are inserted for convenience only and are not to be considered in construction of the provisions hereof.
- 12.7. **Notice.** Whenever any notice, demand or consent is required or permitted under this Agreement, such notice, demand or consent shall be sufficiently given if personally delivered or if mailed by first class, registered or certified mail postage prepaid or by overnight carrier to the following addresses:

PSC: Pack Square Conservancy, Inc.
Attention: Carol I. King
40 North French Broad Avenue
Asheville, North Carolina 28801

City: City of Asheville
Attention: City Manager
P.O. Box 7148
Asheville, North Carolina 28802

County: Buncombe County
Attention: County Manager
One Oak Plaza, Suite 105
Asheville, North Carolina 28801

- 12.8. **Amendments.** This Agreement may be amended at any time only by the written agreement of the parties hereto.
- 12.9. **Counterparts.** This Agreement may be executed in one (1) or more counterparts, each of which shall be deemed an original but all of which together shall constitute one (1) and the same Agreement.
- 12.10. **Waiver of Breach.** Waiver of breach of any provision of this Agreement shall not be deemed a waiver of any other breach of the same or different provisions of this Agreement.

12.11. Confidentiality. Except for disclosure in confidence to its accountants, bankers, or attorneys, neither party shall disseminate or release to any third party any information regarding any provision of this Agreement or any financial or other competitively sensitive information regarding the other party that was obtained in the course of negotiating this Agreement or in the course of performance under this Agreement, without the other party's prior written consent; provided, however, the foregoing shall not apply to information which is: (i) generally available to the public other than as a result of a breach of a confidentiality provision; (ii) available on a non-confidential basis from a source other than the party or its affiliates or agents, which source is itself not bound by a confidentiality agreement; (iii) required to be disclosed by law or court order, but only to the extent of such disclosure necessary to respond to such law or court order, or (iv) necessary to be disclosed by the party in order to perform its obligations under this Agreement, but only to the extent of such disclosure necessary for such performance.

12.12. No Obligations to Third Parties. None of the obligations and duties of PSC, City or County under this Agreement shall in any way or in any manner be deemed to create any obligation of PSC, City or County to, or any rights in, any person or entity not a party to this Agreement.

12.13. Director Understanding. The parties hereto acknowledge and understand that the Bylaws of CPC provide that the Regular Board of Trustees of CPC consists of eleven (11) members (each with a three-year term), seven of whom are at-large appointed by the Trustees of CPC, and one (1) of whom is appointed by each of the following four entities or individuals: City, County, Asheville Downtown Commission and the Director of Asheville Parks and Recreation.

12.14. Survival. The parties hereto acknowledge and agree that Sections 10.1, 10.2, 11.1, 11.2 and 11.3 hereof (and such other provisions of this Agreement as are necessary or desirable to enforce or interpret said Sections) shall specifically survive the termination of this Agreement.

12.15. Governmental Fiscal Limitation. Nothing herein shall be construed as a pledge of the taxing authority of the City or County in violation of the applicable provisions of the North Carolina Constitution or the Local Government Budget and Fiscal Control Act, and nothing herein shall be construed as requiring the City or County to make budgetary appropriations.

IN WITNESS WHEREOF, this Agreement is entered into and executed as of the date first written above.

ATTEST:

CITY OF ASHEVILLE

Magdalen Bondison
City Clerk
(official seal)

By: [Signature]
City Manager

ATTEST:

COUNTY OF BUNCOMBE

Kathy Hughes
Clerk to Board of Commissioners
(official seal)

By: [Signature]
County Manager

ATTEST:

PACK SQUARE CONSERVANCY, INC.

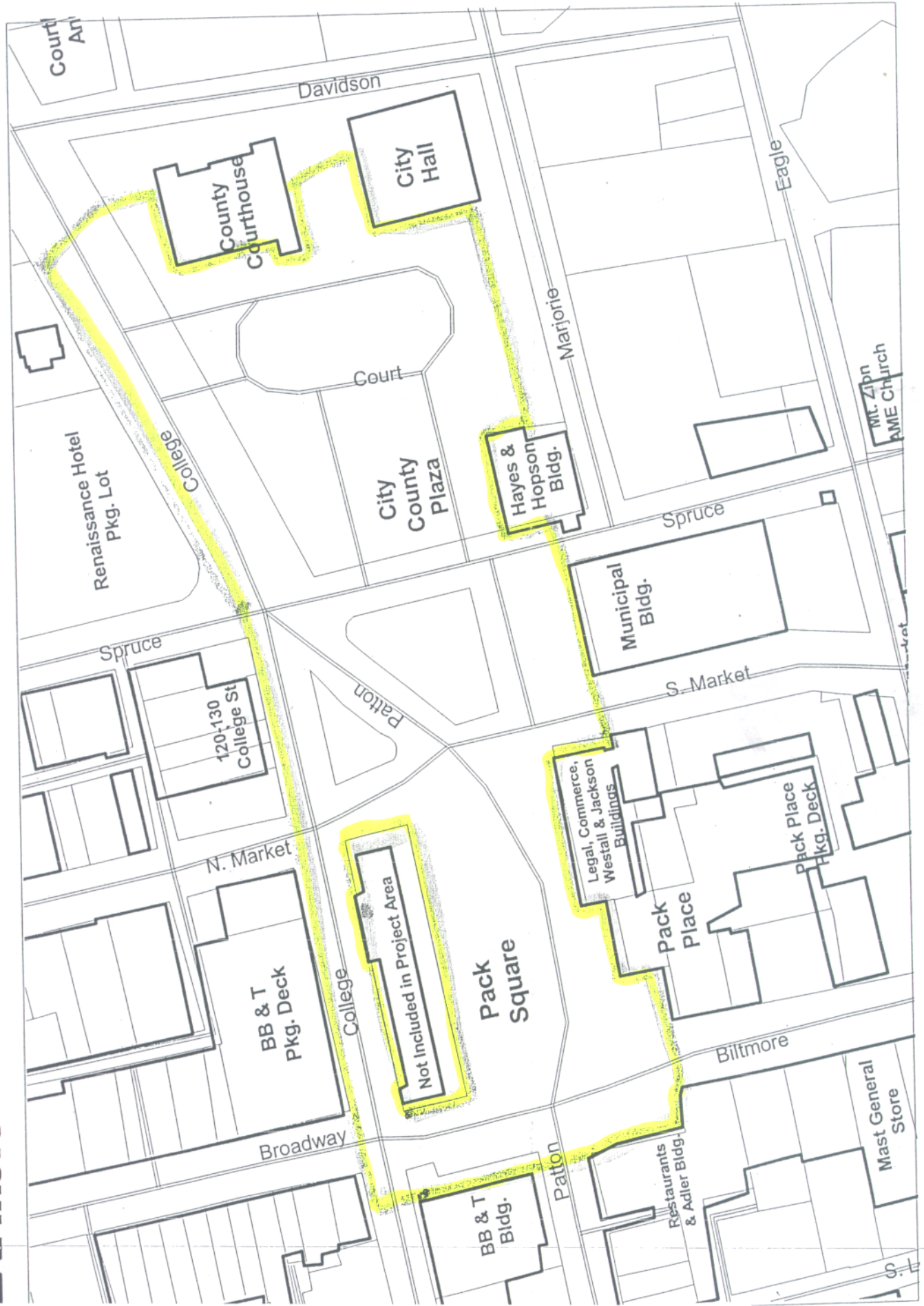
Karen A. Seeger
Corporate Secretary
(corporate seal)

By: [Signature]
Title: PRESIDENT

PACK SQUARE
CONSERVANCY, INC.

Exhibit A

Official Exhibit A is 24 x 36" Survey



400 Feet